FEDERAL INCORPORATION OF RAILWAY COMPANIES

IN a country of an area so vast as the United States, with such variations of soil and climate, efficient transportation is a paramount necessity; transportation to satisfy both the needs of commerce and the requirements of preparedness for war and the public defense. The means of transportation have fallen behind the needs of commerce in peace and would more strikingly fail to fill the requirements of war. Railroad construction has come almost to a stop.

Whether this be caused in whole or part by unwise regulation does not concern this inquiry. At least the opinion is widely held by students of the subject that any system of regulation of railways by many governments, by the nation and by each state acting in discord, is doomed to failure and is destructive of the railways. Their regulation by the national government to the greater exclusion of the states, and to that end their incorporation as national railways, is being considered by a joint committee of the two houses of Congress.

I purpose to inquire into the power of Congress in the premises.

The subject may be dealt with by Congress under any or all of its pertinent powers (*a*) to regulate commerce with foreign nations and among the several states and with the Indian tribes, (*b*) to establish post offices and post roads, and (*c*) to provide for the common defense and general welfare and make war.

The power to form corporations is not mentioned in the Constitution, but Congress is given power to enact all laws necessary and proper for carrying into execution the granted powers. The incorporation of a national bank was justified by Hamilton as a proper means of executing the power of Congress over money, and Hamilton's opinion was sustained in *McCulloch* v. *State of Maryland*[1] and *Osborn* v. *U. S. Bank*.[2] It was held in these decisions that Congress might confer on the bank power to do a private

[1] 4 Wheat. 316 (1819).

[2] 9 Wheat. 738, 859 (1824).

banking business, because it might be that the private business would enable the bank more efficiently and economically to perform its governmental functions. On the same principle the court sustained the constitutionality of the acts of Congress incorporating the Pacific Railroad companies which conferred on them the general right to do business for others in addition to government transportation.[3] And the power of Congress is well established to provide for condemnation of lands within any state as a means of executing any of the granted federal powers.[4]

The foregoing decisions fully settle (1) that Congress has power without the consent of the state to build railroads and condemn land and do other things proper and necessary, (2) that it has power to delegate this authority to corporations.

In *Monongahela Navigation Co.* v. *United States* and *Railroad Company* v. *Maryland*[5] it was held that Congress has the same power over railways and other artificial highways which it has over navigable waters. The application of this principle will be referred to later.

Power in Congress to pass a national incorporation law implies power to give corporations formed under the law the franchise and right to act in corporate capacity throughout the United States without regard to state lines, to prescribe their method of organization, to regulate their stocks and indebtedness and their internal affairs, including the rights and obligations of shareholders, to the minutest detail.

Should it be suggested that Congress could not exclude, or at least ought not, under the guise of creating federal incorporations, to exclude the states from regulation of their internal affairs, it may be conceded that Congress could not exceed its just powers by the mere device of federal incorporation.

But this leads to the inquiry how far Congress in the exercise of either its power over commerce, its power to establish post roads,

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[3] California *v.* Pacific R. Co., 127 U. S. 1 (1887); Luxton *v.* North River Bridge Co., 153 U. S. 525, 533 (1893).

[4] Kohl *v.* United States, 91 U. S. 367 (1875); Fort Leavenworth R. Co. *v.* Lowe, 114 U. S. 525 (1884); Cherokee Nation *v.* Kansas Ry. Co., 135 U. S. 641 (1889); Stockton *v.* Baltimore, etc. R. Co., 32 Fed. 9 (1887); Chappell *v.* United States, 160 U. S. 499 (1895); Monongahela Navigation Co. *v.* United States, 148 U. S. 312 (1892).

[5] 21 Wall. 456 (1874).

or its power to make war and provide for the public defense, or all of these powers, may take over the regulation of railways to the exclusion of the states.

The more essential things in respect of which Congress would probably or possibly legislate are (*a*) regulation of the stock and indebtedness of railways, (*b*) regulation of their appliances and operations — for example, the character of their cars and locomotives, their train crews and other employees — and (*c*) regulation of their tariffs and charges, including those for transportation wholly within the limits of a state.

Efficient transportation being of the first importance and having the most direct relation to commerce with foreign nations and among the states, to the carriage of the mails, government troops, and military supplies, it would seem self-evident that Congress must have the power to adopt and make effective all means proper in its judgment to secure efficient transportation.

It may well be that to secure efficiency of transportation, to induce capital into construction of added railways and new improvements and facilities, a certain attractiveness of profit must be offered, or even certain guaranties made. Congress has therefore the right to determine a policy with respect to railways, to determine what profits capital invested in them must be offered. But to settle and carry out such a policy requires, or may require, regulation of the stock and indebtedness of railways, determination of the amount of each, the purposes for which each may be issued, the prices at which each may be offered to the public, and the rights and liabilities of the holders of stock and debts.

It may well be that Congress will also find it necessary in order to secure prosperity and improvement of the railways, in order, in other words, to secure efficient transportation of interstate commerce and of government mails and supplies, to regulate completely the character of railway locomotives and their equipment, to say, for example, whether the locomotives shall carry electric headlights or other headlights and of what power, and what crews shall man the trains. Should Congress determine to enter into this field, no doubt can be entertained of its power.

Similarly, should Congress decide it necessary, in order to secure efficient transportation of foreign commerce and commerce among the states, and efficient transportation of mail and government sup-

plies, to regulate the earnings of the railways from traffic moved wholly within a state, it has the power to take over regulation of such local earnings. It has power to do the same thing should it find exercise of that power necessary to prevent discriminations as between transportation local to a state and transportation with foreign nations and among the states; in other words, to prevent the government scheme of rates from being broken down by inconsistent local state rates.

It is thought that these propositions are settled by the decisions of the Supreme Court.

This flows necessarily from what the court decided in *Brown* v. *Maryland*,[6] where it was said:

"It has been observed, that the powers remaining with the states may be so exercised as to come in conflict with those vested in congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation."

Recurring to the doctrine held in *Monongahela Navigation Co.* v. *United States*,[7] that the power of Congress is as far-reaching over the railways as over the natural highways by water, let us see what the court has decided with respect to the power of Congress over waters.

In *The Daniel Ball* [8] the power of Congress was sustained to regulate a steamboat plying on water wholly within the state of Michigan but carrying goods coming from and going to points beyond the state. Congress has assumed *exclusive* jurisdiction of water highways; [9] has required all steam vessels running on navigable waters of the United States to be licensed regardless of whether they carry commerce among the states; [10] has regulated the contractual relations of employer and employee; [11] and of owners and shippers.[12]

It was held in *Gibbons* v. *Ogden*,[13] and this holding was followed in

[6] 12 Wheat. 419, 448 (1827).

[7] 148 U. S. 312 (1892).

[8] 10 Wall. 557 (1870).

[9] Wisconsin *v.* Duluth, 96 U. S. 379, 387 (1877).

[10] The Daniel Ball, *supra;* The Hazel Kirke, 25 Fed. 601 (1885); The Oyster Police Steamers, 31 Fed. 763 (1887).

[11] Patterson *v.* Bark Eudora, 190 U. S. 169 (1902).

[12] *In re* Garnett, 141 U. S. 1 (1890).

[13] 9 Wheat. 1 (1824).

Brown v. *Maryland*,[14] that the power of Congress over commerce is complete and acknowledges no limitations other than those prescribed by the Constitution; that the power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but may enter its interior.

It was said in the *Minnesota Rate Cases:* [15]

"There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

The *Minnesota Rate Cases* establish that a state may lawfully fix local rates within its borders until Congress acts; but that when Congress finds it proper to take over regulation of local rates, in order efficiently and completely to regulate commerce with foreign nations and among the states, there is no defect in congressional power.

The principle of the *Minnesota Rate Cases* was followed in *Houston & West Texas Railway Co.* v. *United States*,[16] which must be considered to have settled beyond further controversy: that the authority of Congress is at all times adequate to meet varying exigencies and protect national interests, and necessarily includes the right to control operations of carriers in all matters having such a close and substantial relation to commerce among the states that control is essential or appropriate to regulation of such commerce; that transportation by carriers local within states cannot derogate from the complete and paramount authority of Congress, or preclude the federal power from preventing local operations being used as a means of injury to what has been confided to federal authority; that it is for Congress to say, and not the states, what is necessary for com-

[14] 12 Wheat. 419, at 446 (1827).

[15] 230 U. S. 352, at 399 (1912).

[16] 234 U. S. 342 (1913).

plete control of commerce among the states, and that Congress, in order to perfect and protect that control, may regulate transportation wholly within a state.

It has therefore been determined that Congress, under its power to regulate commerce, may itself build railways or provide for government railways by delegation of power to corporations. The government may also provide for transportation of its mails, its armies, and its property by any means it chooses to select. Under these ample powers it may provide its own instrumentalities of transportation or may make use of existing instrumentalities.

In determining the method of exercise of either of the powers referred to, Congress is subject to no limitations except those expressed or implied in the Constitution of the United States. Neither the existence of the states nor any state power imposes such limitation. The power of Congress is as ample as if there were no states.

Congress may therefore adopt the means of chartering new federal incorporations; it may by that means or by direct action build a system of government railways throughout the United States; it may provide for condemnation of existing railways. The broad and unlimited power being granted, there seems to be no difficulty in Congress making the existing railways federal incorporations with such powers and rights as it chooses to confer. The non-consent of the states certainly is not a valid objection. We have long been familiar with the act of Congress under which state banks by specified vote of stockholders may convert themselves into national banks. This transmutation may be made against the will of the state. It may be made against the will of minority stockholders. *Casey* v. *Galli* [17] holds that no consent of the state is necessary because "it was as competent for Congress to authorize the transmutation as to create such institutions originally." And if the transmutation may be made against the objection of a minority of stockholders it may be made without vote or consent of any stockholder. It would seem to be a conclusive answer to a stockholder's objection that he went into the enterprise subject to the possible exercise of lawful governmental authority.[18]

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[17] 94 U. S. 673 (1876).

[18] Louisville & Nashville R. Co. *v.* Mottley, 219 U. S. 467, 480 (1910).